IN THE

Supreme Court of the United States

October Term, 1945

No. 311

JAMES H. HICKEY, HOWARD CHARDAVOYNE AND SAMUEL W. CHARDAVOYNE, AS EXECUTORS UNDER THE LAST WILL AND TESTAMENT OF HENRY S. CHARDAVOYNE, DECEASED,

PETITIONERS,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER OF THE FORT GREENE NATIONAL BANK IN NEW YORK

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND BRIEF IN SUPPORT THEREOF.

JAMES H. HICKEY,
Attorney for Petitioners.

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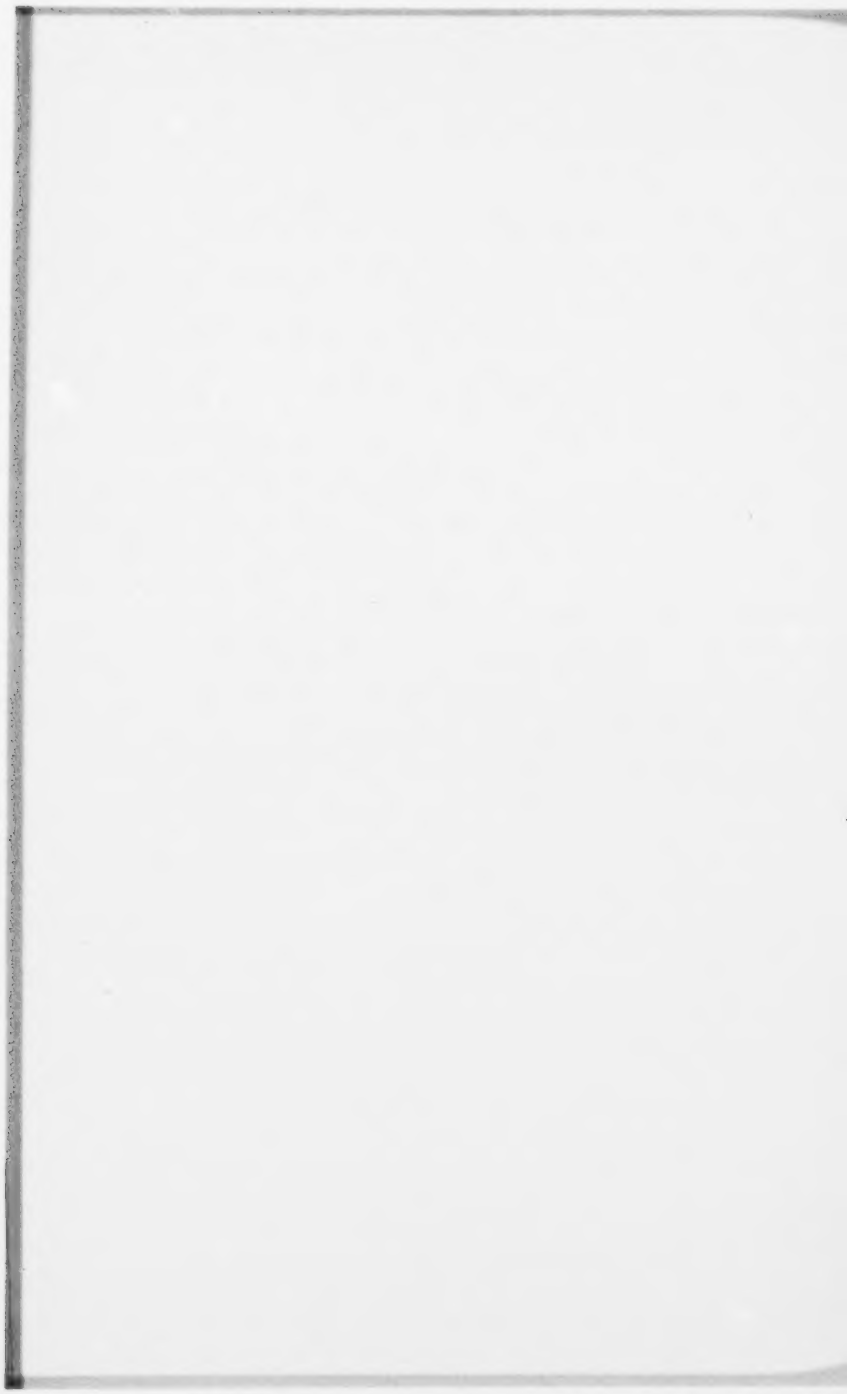

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Supreme Court of the United States

October Term, 1945.

No.

JAMES H. HICKEY, HOWARD CHARDAVOYNE AND SAMUEL W. CHARDAVOYNE, as Executors under the Last Will and Testament of HENRY S. CHARDAVOYNE, Deceased,

PETITIONERS,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver of The Fort Greene National Bank in New York

PETITION FOR A WRIT OF CERTIORARI.

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of James H. Hickey, and Howard Chardavoyne and Samuel W. Chardavoyne, as Executors under the Last Will and Testament of Henry S. Chardavoyne, deceased, for a writ of certiorari to the Court of Appeals of the State of New York respectfully shows:

SUMMARY AND SHORT STATEMENT.

The petitioners were sued as stockholders of the Fort Greene National Bank in New York, in the Supreme Court of the State of New York, to recover an assessment levied upon them by the Comptroller of the Currency, by reason of the insolvency of the Bank. The action was brought by the Federal Deposit Insurance Corporation as Receiver of the Bank.

The complaint alleged that when the Comptroller of the Currency assumed control of the bank above-named, the petitioners were record holders of certain shares of assessable stock; that on November 24, 1937 the said Comptroller levied an assessment against said petitioners equal to the par value of the said stock and so notified them by registered mail; that by reason thereof, the said petitioners were liable for an assessment equal to the par value of the stock so held by them; and that judgment should be rendered against them (R. 3).

The answers interposed by the petitioners denied liability, claiming that the stock held by them was issued subsequent to June 16, 1933 and was not subject to the additional liability by virtue of the statute, 12 U. S. C. A. 64a which provides as follows:

> "The additional liability imposed upon shareholders in national banking associations by the provisions of sections 63 and 64 of this title shall not apply with respect to shares in any such association issued after June 16, 1933." (R. 8).

The evidence adduced at the trial disclosed that the Bank was organized in 1929 with a total capitalization of $500,000 composed of 5,000 shares of common stock of the par value of $100 each (R. 13). At or about that time stock was issued to the petitioners (R. 13). Thereafter in June of 1934, there was a reorganization and a recapitalization of the Bank with the approval and consent of the Comptroller of the Currency, accomplishing the following: (1) The capital was reduced to $350,000 and the par value of the common stock was reduced to $70; (2) $125,000 of the amount of the reduction was applied to the charging off, writing down, or eliminating certain assets without distributing such assets; (3) $25,000 of the amount of the reduction was transferred to surplus; (4) Preferred stock of $150,000 was authorized and issued to the Reconstruction Finance Corporation (3,750 shares at $40 par value); (5) Voting rights

of the common stockholders were disproportionately reduced and voting control, in effect, became vested in the preferred stockholders; (6) The common stockholders' right to dividends was subordinated to the preferred stockholder; (7) The common stockholders' right to participate in the asests upon liquidation was subordinated to the preferred stockholder (Pltff's Ex. 1, R. 15).

Thereafter and in October of 1934 there was a further recapitalization and reorganization with the approval and consent of the Comptroller of the Currency in which: (1) The capital of the Bank was increased from $500,000 to $650,000 of which $500,000 was common stock and $150,000 was preferred stock; (2) $150,000 worth of common stock of the par value of $10 a share was to be sold; (3) The preferred stock of $150,000 was to be retired; (4) The outstanding common stock was to be surrendered and cancelled; (5) The par value of common stock was to be valued at $10 per share and old stockholders were to receive seven shares of new class "A" stock for each old share of common stock which was surrendered and cancelled; (6) All newly authorized common stock which was issued in exchange for the old stock and for cash was to have equal voting rights, equal right to dividends, equal right to assets upon liquidation (Pltff's Ex. 2, R. 17).

The Trial Court ruled that the shares held by the petitioners were issued after June 16, 1933 and that section 64a of 12 U. S. C. A. exempted such stock from the additional liability. Judgment was entered dismissing the complaint on the merits (R. 9). On appeal to the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department this judgment was reversed on the ground as stated in its opinion that the statute (12 U. S. C. A. 64a) did not apply and that the stock was not issued after June 16, 1933. Judgment was entered against the petitioners without costs (R. 57). On appeal to the Court of Appeals of the State of New York the judgment was affirmed without costs by its order of affirmance dated May 17, 1945 and judgment was entered accordingly (R. 71).

It is upon this final judgment that certiorari is sought.

STATEMENT SHOWING JURISDICTION OF THIS COURT.

Judgment was sought against the petitioners under the provisions of sections 63 and 64 of 12 U. S. C. A., which provides for additional liability of stockholders in national banks.

The defense of the petitioners likewise proceeded upon a federal statute, Act of June 16, 1933, c. 89, which provides as follows:

> "The additional liability imposed upon shareholders in national banking associations by the provision of sections 63 and 64 of this title shall not apply with respect to shares in any such association issued after June 16, 1933 * * *." (12 U. S. C. A. 64a.)

There was clearly presented therefore, the construction and interpretation of federal statutes which were necessary to the determination of this case. Section 237 of the Judicial Code, 28 U. S. C. A. 344 provides that this Court may grant certiorari to review the decision of the highest court of a state involving a federal question. The construction and interpretation of federal statutes are federal questions.

Rule 38, paragraph 5, subdivision (a) of the Rules of this court states that a writ of certiorari will be granted where a federal question of substance has been decided by a state court in a way probably not in accord with the decision of the federal courts. As set forth herein below the decision of the Court of Appeals is contrary to the decision of the United States Circuit Court of Appeals for the Eighth Circuit in the case of *Federal Deposit Insurance Corp.* v. *Gunderson*, 106 F (2d) 633.

The Court of Appeals of the State of New York is the highest court of that State. Its judgment is dated May 17, 1945.

This application for a writ of certiorari is being presented on or before August 15, 1945.

The question was presented in petitioner's answer.

A SHORT STATEMENT OF THE QUESTIONS PRESENTED IN THIS CASE.

The following questions have presented themselves in this case for determination:

1. Whether the state courts may presume to ascertain the reason underlying a Congressional enactment when the statute involved is clear and unambiguous and which, federal courts have held, was not susceptible of such judicial construction.

2. Whether national bank stock, having been surrendered and cancelled in a recapitalization and reorganization approved by the Comptroller of Currency, and new stock having been issued in place thereof after June 16, 1933, such original stock can be considered to have any existence for the sole purpose of supporting a stock assessment action under sections 63 and 64 of 12 U. S. C. A.

3. Whether the stockholders of a national bank having entered into a contractual arrangement and having given up certain rights and having surrendered their stock for cancellation and having received new stock with subordinate rights and powers and having been compelled by federal statute to pay premiums for deposit insurance, can now be held liable for a stock assessment as though such original stock had never been cancelled and no compulsory deposit insurance had ever been required.

4. Whether the granting of a judgment upon an assessment herein is not depriving the petitioner-stockholders of their property without due process of law and is not a violation of their contract rights.

5. Whether the remedy given in the Act of June 16, 1933, c. 89, providing creditors of national banks with deposit insurance (see 12 U. S. C. A. 264), is not an exclusive remedy in place of the double liability which existed theretofore with regard to stock issued after June 16, 1933. See *Globe Newspaper Co.* v. *Walker*, 210 U. S. 356.

A STATEMENT OF THE REASONS FOR GRANTING THIS WRIT.

Many reasons present themselves for the granting of the writ in this case.

1. A question of substance is involved not heretofore decided by the United States Supreme Court.

2. The highest court of the State of New York has decided an important federal question contrary to the Circuit Court of Appeals for the Eighth Circuit.

3. The rights and liabilities of thousands of stockholders of national banking associations remain uncertain and unsettled.

4. A determination by this court of the questions presented will clear the federal and state dockets of cases involving the same question.

WHEREFORE, your petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Court of Appeals of the State of New York commanding that court to certify and send to this court for its review and determination on a day certain to be named therein a full and complete transcript of the record and all proceedings in this case and that the judgment of the said Court of Appeals of the State of New York be reversed and that your petitioners may have such other and further relief in the premises as may appear just to this Honorable Court.

Dated, New York, N. Y., August 10, 1945.

JAMES H. HICKEY,
Attorney for Petitioners.